

REMARKS

1. Status of the Claims

Claims 1-18 are pending in this Application. None of the claims have been canceled. By this Response, Applicant amended Claims 4, 6 and 14. Applicant respectfully submits no new matter was added and that the amendments are fully supported by the application as originally filed. Accordingly, Claims 1-18 are at issue.

Applicant respectfully submits that the above amendments to the claims also overcome the objections of claims 4, 6 and 10-18 under 35 U.S.C. 112, second paragraph. Furthermore, Applicant respectfully requests withdrawal of the rejection of claims 1-18 under 35 U.S.C. 112, first paragraph, in view of the discussion below, and because Applicant's examples do not contain an emulsifier.

2. Rejection of Claims under 35 U.S.C. 102

Claims 1-9 stand rejected under 35 U.S.C. §102(b) as being anticipated by U.S. Patent No. 6,197,362 to Hussein. In order for a reference to act as a §102 bar to patentability, the reference must teach each and every element of the claimed invention. *Kalman v. Kimberly-Clark Corp.*, 713 F.2d 760, 771 (Fed. Cir. 1983). Without the required teaching of "each and every element" as set forth in the claims, it is improper to maintain such rejections under §102(b). Hussein does not teach each and every element of the claimed invention, and thus fails as an anticipatory reference.

The present invention is directed to a dairy-based pourable dessert topping without an emulsifier. Applicant's product is used in the creation of the traditional Tres Leches cake, which is a cake soaked with a dairy mix. Applicant's dairy-based formulation does not require the presence of an emulsifier to create the desired taste, viscosity and soaking rate for the desired use. Applicant further submits that an emulsifier and a stabilizer are two different ingredients, and that Applicant's formulation with its absence of an emulsifier is an improvement.

On the other hand, Hussein discloses a pourable dessert liquid product. Hussein specifically lists separately an emulsifier **and** a stabilizer as ingredients in his formulation – “[t]he amount of emulsifier should be about 0.1 weight % to about 2.0 weight of the product . . .” (Col. 2, lines 24-26). Hussein then goes on to list examples of emulsifiers useful in his invention. (Col. 2, lines 26-31). Hussein does not state that the emulsifier can be left out of his formulation, nor does he state that stabilizers and emulsifiers are one in the same. Notably, all of Hussein’s examples include an emulsifier. Hussein specifically lists stabilizers and emulsifiers separately, further supporting the fact that stabilizers and emulsifiers are two different and required ingredients in Hussein’s formulation. If stabilizers and emulsifiers were one in the same as asserted in the Office Action, then both ingredients would not be mentioned separately and one of them would not be necessary. However, that is not what Hussein discloses. Applicant respectfully submits that Hussein teaches away from his invention, which is a formulation clearly absent the presence of an emulsifier.

The presence of an emulsifier is clearly absent from Applicant’s formulation. Further, Applicant submits that stabilizers and emulsifiers are not necessarily one in the same, such that the formulation of Hussein is the same as Applicant’s. Therefore, Applicant respectfully submits that because Hussein does not teach each and every element of the present invention, Applicant’s invention is not anticipated by Hussein. Claims 2-9 depend from claim 1 and necessarily include all of its limitations. The dependent claims further include elements not found in the Hussein formulation, and therefore, these claims are likewise patentable over Hussein.

3. Rejection of Claims under 35 U.S.C. 103(a)

Claims 10-18 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Hussein in view of an article in Dairy Foods, titled "New Heights in Emulsifier Technology – Elimination of Polysorbate 80 from Dairy Food Formulations." Applicant respectfully submits that combination of the cited references is improper, but even if proper, Applicant's invention is patentable over the combination of references.

Hussein was discussed above. The Dairy Foods article is directed to replacing current emulsifiers, such as polysorbate 80 with a stabilizer/emulsifier blend. The article does not disclose elimination of the emulsifier all together. Hussein describes a pourable dessert liquid product, which specifically includes stabilizers and emulsifiers in the formulation. There is no teaching in Hussein that the emulsifier can be eliminated or substituted with something else, and therefore Hussein teaches away from the present invention. The Dairy Foods article discusses the replacement of a known emulsifier, polysorbate 80 with stabilizer/emulsifier blends. However, the formulation of the present invention does not contain an emulsifier to begin with, so there would be no reason to consider the Dairy Food article in connection with the present invention. Therefore, it does not follow to combine the Dairy Foods article with the Hussein formulation to arrive at Applicant's invention, and one skilled in the art would not combine these references to arrive at Applicant's invention. Further, both references appear to teach away from the formulation of the present invention.

Even if the combination was proper, Applicant's invention is patentable over the combination. The present invention is directed to pourable dairy-based dessert product that does not contain an emulsifier. The formulation of Hussein clearly contains both a stabilizer and an emulsifier, without exception. The Dairy Foods article discusses replacement of a known emulsifier with stabilizer/emulsifier blend. There is no teaching in Hussein that the formulation can be made without an emulsifier. Clearly, neither reference, alone or in combination, teach Applicant's invention. Therefore, Applicant submits claims 10-18 are patentable over these references.

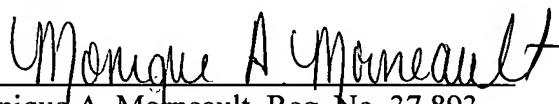
CONCLUSION

In light of the foregoing reasons, Applicant respectfully requests reconsideration and allowance of claims 1-18. The Commissioner is authorized to charge any additional fees or credit any overpayments associated with this Amendment to Deposit Account 13-0206.

Respectfully submitted,

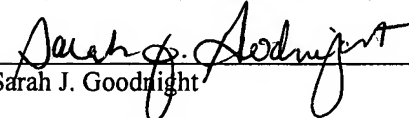
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